

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



~~1-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100~~

75-1237

To be argued by  
WILLIAM L. RICHMAN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

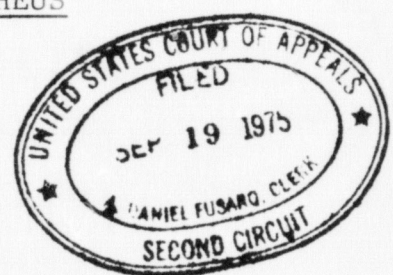
Docket No.  
75-1237

WILLIAM DREW, RICHARD ORPHEUS, ERIC  
BLITZ, PETER HORVAT,

Defendants-Appellants.

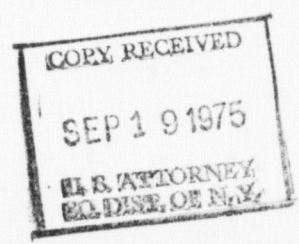
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REPLY BRIEF FOR RICHARD ORPHEUS



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REPLY BRIEF FOR RICHARD ORPHEUS

The concession by the Government that the evidence was insufficient to sustain the convictions in Counts Seven through Twelve and Counts Fourteen through Seventeen necessarily limits this reply to Counts One, Thirteen and Eighteen of the indictment. Inferentially, the concession could readily have been extended to Counts One, Thirteen and Eighteen, since the evidence is likewise insufficient to sustain the convictions.

The conspiracy count, as enunciated in the Government's brief, specifically fixes the birth of the conspiracy in March of 1971 and the principals as



George Van Aken and Stephen Hill. It was in March of 1971 that Van Aken acquired Elinvest, at that time traded over the counter at \$4.00 per share. With the merger of Leisure Time Marine Corp. (LTMC), he converted this enterprise to a viable vehicle which could be traded over the counter after the transfer agent issued unrestricted certificates to Van Aken's father-in-law, John Bradley, Stephen Duke, Hill, and Hill's law partners. This arrangement paved the way for the sale of the Duke stock, the actual subject matter of this prosecution.

It was not until June 1971 that the services of Orpheus were enlisted to the extent of being a liaison between the salesmen and Ridgeway McLeod and Associates (RMA). On this thin thread the Government seeks to link Orpheus to a conspiracy, hatched in March by Van Aken, Hill, and perhaps Duke and Bradley.

It is significant that the Government leaves unanswered the queries raised in the main brief as to the facts conveyed to "Richie Orpheus...about the company" and what "Richie Orpheus" did to bring the price up (499). The record fully supports the position taken by this appellant that he was a mere hireling in this

enterprise and that there is absolutely no affirmative act on his part that connects him to the conspiracy.

The indictment itself corroborates the miniscule participation of Orpheus as "an unemployed securities trader" (11A, para. 11) and subdivision vi of paragraph 4 (14A), where he is grouped with Drew, Santini, McLeod and Gerstenzang, causing RMA to purchase Elinvest stock and "by fraud and threat induce members of the public to buy Elinvest stock." This record fully supports the defense asserted by Orpheus that his whole function consisted of communication with market makers and RMA in connection with the transfer of stock to ultimate purchasers. The record succinctly confirms Orpheus' testimony that he never sold one share of stock to the members of the public nor did he attempt to sell a single share of stock to the public.

Count Thirteen

This count charges named defendants, including Orpheus, with using "means and instrumentalities of interstate commerce and of the mails pursuant to and in furtherance of the offenses...in connection with sales of Elinvest stock to persons as shown below: (page 18A



and 19A" referring to a sale of 200 shares of Elinvest stock to Archibald W. Denny, Jr., on July 8, 1971. In this connection, the Government argues, that since the sale by Peter Horvat was made on July 8, 1971, and during the time that Orpheus was involved in the sale of the Duke stock, he was tarred with the same brush because, says the Government, the activity of Orpheus "permitted Horvat to continue his fraudulent activity, part of which being the sale to Denny" (Appellee's Brief, page 35). This, it is submitted, is too far fetched to permit the conviction under this count to stand, particularly since there is absolutely no connection between Orpheus and Horvat nor with Horvat's employer, Barron and Company, nor is there proof, as the Government contends, that his "actions were intended to and did in fact assist Horvat's fraudulent activities" (Appellee's Brief, page 35).

Count Eighteen

The indictment with respect to this count charges Orpheus with the use of the mails in connection with a sale of stock to Lenore Braunfeld on June 30, 1971,

by way of "confirmation of the purchase of shares of Elinvest stock" (20A). This count, the Government argues, is fully sustained by reason of the fact that the actual sale was made from Van Aken's apartment by Gerstenzang and that Orpheus telephoned the details of the sale to McLeod. Absent scienter and intent, this conviction cannot be sustained.

#### CONCLUSION

This record raises more than a reasonable doubt. It lacks substance with respect to Orpheus' participation in the "conspiracy". There is no proof that he knew of the Van Aken machinations, that he had reason to believe that Elinvest was a shell, since it was selling in the open market at \$4.00 a share prior to his employment.

It is further submitted that the jury was completely unaware of the function of a market maker in the financial trading exchanges and that the failure of the court to explain this legitimate operation prevented the jury from properly evaluating the participation of Orpheus. The testimony with respect to market maker in this record is clouded with nefarious acts instead of a



registered security trader, whose function is to maintain an orderly market by publishing bid and asked prices for a security.

It is, therefore, submitted that the failure of the court to explain the place of a market maker in the security exchanges prevented the jury from properly evaluating the testimony in this prosecution.

Respectfully submitted,

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Appellant Richard Orpheus